

## CLOSING THE COURTHOUSE DOORS TO CIVIL RIGHTS LITIGANTS

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*Legal Services Corporation v. Velazquez*,<sup>1</sup> which is the focus for this symposium, is an aberrational decision. Simply stated, it is aberrational because a civil rights plaintiff won, which has rarely happened in recent years in the Rehnquist Court. A year ago, in October Term 2000, the Court ruled against civil rights claims in virtually every case in which they were presented.

In *Board of Trustees of the University of Alabama v. Garrett*, the Court held that state governments cannot be sued for employment discrimination in violation of Title I of the Americans with Disabilities Act.<sup>2</sup> In *Alexander v. Sandoval*, the Court ruled that there is not a private right of action to enforce the regulations to Title VI of the 1964 Civil Rights Act, which prohibits recipients of federal funds from engaging in practices which have a racially discriminatory impact.<sup>3</sup> *Circuit City Stores, Inc. v. Adams* declared that the Federal Arbitration Act requires arbitration of state law discrimination claims when there are contractual provisions calling for arbitration of employment related disputes.<sup>4</sup> In *Booth v. Churner*, the Court said that the Prison Litigation Reform Act requires that a prisoner seeking money damages exhaust prison administrative remedies, even if they cannot provide such a remedy, so long as they can offer the prisoner something of value.<sup>5</sup> *Saucier v. Katz* held that a police officer can be deemed protected by qualified immunity, even when there is a jury finding that the officer used excessive force.<sup>6</sup>

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<sup>1</sup> 531 U.S. 533 (2001) (declaring unconstitutional a federal statute preventing attorneys receiving funds from the Legal Services Corporation from bringing challenges to welfare laws).

<sup>2</sup> 531 U.S. 356 (2001).

<sup>3</sup> 532 U.S. 275 (2001).

<sup>4</sup> 532 U.S. 105 (2001).

<sup>5</sup> 532 U.S. 731 (2001).

<sup>6</sup> 533 U.S. 194 (2001) (holding that in a civil rights case alleging constitutionally excessive force, the tests for qualified immunity and reasonableness are distinct and that a finding of excessive force does not preclude a finding of qualified immunity).

Quite significantly, in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, the Court made it much more difficult for successful plaintiffs to recover attorneys' fees.<sup>7</sup> The Court said that a plaintiff is not deemed to "prevail" just because his or her lawsuit is the "catalyst" for the government to change its policy.<sup>8</sup> Attorneys' fees are to be awarded only when there is a judicial action—a judgment or consent decree—in favor of the plaintiff.

Individually, each of these rulings is likely to be important in civil rights litigation. Cumulatively, they are an astounding number of anti-civil rights rulings in a single Term. Yet, it was not an aberrational year. In the just-completed October Term 2001, the Court held that Section 1983 cannot be used to enforce the Federal Educational Records and Privacy Act;<sup>9</sup> that punitive damages are not available in actions under Title VI, the Rehabilitation Act, or the Americans with Disabilities Act;<sup>10</sup> that individual prisoners must exhaust administrative remedies when complaining of the use of excessive force by prison guards;<sup>11</sup> and that state governments cannot be sued in federal agency proceedings.<sup>12</sup>

I do not want to overstate this; there have been some victories for civil rights plaintiffs, such as in *Velasquez*,<sup>13</sup> in *Easley v. Cromartie*,<sup>14</sup> which made it easier for the government to use race in drawing election districts to benefit minorities, and in *Hope v. Pelzer*,<sup>15</sup> which held that there need not be a case on point to deny a government officer qualified immunity. But in the overwhelming majority of civil rights cases, the Rehnquist Court rules against civil rights plaintiffs. This in itself is an important and frequently overlooked aspect of the current

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<sup>7</sup> 532 U.S. 598 (2001).

<sup>8</sup> *Id.* at 600-02.

<sup>9</sup> *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

<sup>10</sup> *Barnes v. Gorman*, 122 S. Ct. 2097 (2002).

<sup>11</sup> *Porter v. Nussle*, 534 U.S. 516 (2002) (declaring that the exhaustion provision of Prison Litigation Reform Act requires inmates to exhaust available administrative remedies before filing action alleging use of excessive force by corrections officer).

<sup>12</sup> *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 122 S. Ct. 1864 (2002) (holding that Congress, by statute, may not authorize Federal Maritime Commission to adjudicate complaints filed by private person against state-run ports as statutory provision permitting adjudication of such complaints is barred by the Eleventh Amendment).

<sup>13</sup> 531 U.S. 533 (2001).

<sup>14</sup> 532 U.S. 234 (2001) (declaring that the district court was clearly erroneous in finding that voting district lines were drawn primarily based on race, because drawing lines primarily for political purposes, even if they correlate with race, does not trigger strict scrutiny).

<sup>15</sup> 122 S. Ct. 2508 (2002) (holding that police officers were not protected by qualified immunity when they tied a prisoner to a hitching post, because officers should have been on notice that this conduct was unconstitutional even though there were no cases on point finding it to be unconstitutional).

Supreme Court. Because the Court has not overruled *Roe v. Wade*,<sup>16</sup> its conservatism in civil rights cases is not fully appreciated.

But I want to focus on a more subtle and even more pernicious theme of the Rehnquist Court's civil rights decisions: *Velazquez* is aberrational because it reflects respect for the importance of the judiciary and access to the courts. Most other recent civil rights cases show a profound disrespect for the importance of the availability of the judicial process to injured individuals. The consistent theme that unites the many recent civil rights decisions is how they close the courthouse doors to those whose rights have been violated.

To be sure, closing the courthouse doors is not a new technique for a conservative court to use to undermine rights. During the early years of the Burger Court, it did this by expanding the scope of abstention doctrines,<sup>17</sup> and by increasing standing as a barrier to civil rights litigation.<sup>18</sup> But the recent decisions are different in an important respect. The Burger Court cases were primarily about channeling civil rights litigation from federal to state court. The Rehnquist Court rulings of the last few years are about precluding all judicial forums. For instance, *Circuit City Stores, Inc. v. Adams*,<sup>19</sup> in holding that employment discrimination claims must go to arbitration when there is an arbitration clause in a contract, means that victims of discrimination in such circumstances have no access to any court. Additionally, *Alexander v. Sandoval*<sup>20</sup> means that victims of practices with a racially discriminatory impact cannot use the Title VI regulations to sue in federal or state court.

In this essay, I make three points. First, the decisions of last Term, and recent years, reflect the Supreme Court's closing the courthouse door to plaintiffs with civil rights claims. Second, there is a paradox: the Supreme Court is exalting its own role at the very time that it is showing disdain for the importance of access to other courts. Finally, I want to examine what might be done to remedy this and restore access to justice.

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<sup>16</sup> 410 U.S. 113 (1973).

<sup>17</sup> See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971) (stating that federal courts may not enjoin pending state court proceedings).

<sup>18</sup> See, e.g., *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975) (both cases ruling that plaintiffs have standing only if they can prove that the defendant was the cause of the injury and that a favorable court decision is likely to remedy the injury).

<sup>19</sup> 532 U.S. 105 (2001).

<sup>20</sup> 532 U.S. 275 (2001).

## I. THE LOSS OF FAITH IN THE IMPORTANCE OF THE JUDICIAL PROCESS

My central point is that there is a consistent and disturbing theme to the Rehnquist Court's decisions in recent years: civil rights plaintiffs lose. The result has become strikingly predictable when the Court hears cases under federal civil rights law. Almost invariably, the plaintiff loses in a 5-4 decision, with the majority comprised of the five most conservative Justices, Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas.

This trend might be overlooked because the Court has used a number of different approaches to justify its conclusions and the cases have involved several statutes. But the overall pattern is clear: the Court's conservative majority almost always finds a way to rule against civil rights plaintiffs and this is usually done by closing the courthouse doors to litigants.

### A. *Closing the Courthouse Doors Based on Trust in the Political Process*

Some cases have justified restricting access to the courts based on a belief that the political process will adequately safeguard rights. The most explicit statement of this was in *Alden v. Maine*, which held that sovereign immunity broadly protects state governments from being sued in state court without their consent, even to enforce federal laws.<sup>21</sup> At oral argument in *Alden*, Solicitor General of the United States Seth Waxman quoted to the Court from the Supremacy Clause of Article VI and contended that suits against States are essential to assure the supremacy of federal law.<sup>22</sup> Justice Kennedy's response to this argument is astounding. He stated:

The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."<sup>23</sup>

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<sup>21</sup> 527 U.S. 706 (1999).

<sup>22</sup> Transcript of Oral Arguments, *Alden v. Maine*, 527 U.S. 706 (1999), available at 1999 U.S. Trans Lexis 1, 11 (Mar. 31, 1999) (No. 98-436).

<sup>23</sup> *Alden v. Maine*, 527 U.S. 706, 754-55 (1999) (alteration in original) (quoting U.S. CONST. art. VI, cl. 2).

What, then, is the assurance that state governments will comply with federal law? Trust in the good faith of state governments. Is it possible to imagine that 30 or 40 years ago, at the height of the civil rights movement, the Supreme Court would have issued such a statement that state governments simply could be trusted to voluntarily comply with federal law? James Madison said that if people were angels there would be no need for a Constitution, but there would be no need for a government, either.<sup>24</sup> The reality is that state governments, intentionally or unintentionally, at times will violate federal law. To rely on trust in the good faith of state governments is no assurance of compliance with federal law at all.

I regard this passage from Justice Kennedy as revealing a central aspect of the Court's recent sovereign immunity decisions: there is no need for access to the courts because the political process can be trusted. In *Alden*, the Court said that both federal and state courts are closed to plaintiffs seeking to enforce the Fair Labor Standards Act against state governments.<sup>25</sup>

Another, perhaps more subtle, example of the Supreme Court restricting access to the courts based on trust in the political process is *Alexander v. Sandoval*.<sup>26</sup> The Court held that there is no private right of action to enforce regulations under Title VI of the Civil Rights Act of 1964, which prevents recipients of federal funds from engaging in practices that have a racially discriminatory impact.<sup>27</sup> Regulations adopted under Title VI prohibit practices with racially discriminatory effect. The importance of these regulations cannot be overstated. The Supreme Court has held that violations of equal protection require proof of discriminatory purpose.<sup>28</sup>

The Title VI regulations are the key way of challenging actions which disadvantage racial minorities when discriminatory purpose cannot be proven. Since it is so difficult to prove discriminatory intent, Title VI has been an enormously important weapon in civil rights litigation.<sup>29</sup> But the Supreme Court, in *Alexander v. Sandoval*, in a 5-4 decision, ruled that no lawsuits can be brought under these regulations. This means that civil rights plaintiffs have lost a key

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<sup>24</sup> THE FEDERALIST NO. 51 (James Madison).

<sup>25</sup> To be accurate, this is not a complete closure of the courthouse. State officers still can be sued for injunctive relief and the federal government still can sue States. But that does not diminish the importance of *Alden*. The Court's holding means that generally a State cannot be sued in federal or state court when it violates federal law.

<sup>26</sup> 532 U.S. 275 (2001).

<sup>27</sup> *Id.* at 293.

<sup>28</sup> See, e.g., *Washington v. Davis*, 426 U.S. 229, 245 (1976).

<sup>29</sup> See, e.g., *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771 (3d Cir. 2001); *Jersey Heights Neighborhood Assoc. v. Glendening*, 174 F.3d 180 (4th Cir. 1999).

weapon for challenging practices that have a racially discriminatory impact.

Notably, the Court, in Justice Scalia's majority opinion, did not invalidate the Title VI regulations, though he did say that their validity was an open question to be considered on another occasion.<sup>30</sup> Instead, the Court assumed the validity of the regulations and ruled that no lawsuits can be brought to enforce them. How, then, are the Title VI regulations to be enforced? The only way is if the political branches of government are willing to cutoff funds to recipients who engage in practices with a racially disparate effect. Once more, the Court is denying access to the judiciary and leaving enforcement of civil rights to the political branches of government.

Likewise, in the just-completed Term, in *Gonzaga University v. Doe*,<sup>31</sup> the Court held that the provisions of the Family Educational Rights and Privacy Act of 1974 (FERPA),<sup>32</sup> which restrict educational institutions from releasing information about their students, cannot be enforced through a private right of action or via a Section 1983 suit.<sup>33</sup> Chief Justice Rehnquist's majority opinion held that since the law was adopted by Congress under its spending power, it could not be enforced via litigation.<sup>34</sup> Like in *Alexander v. Sandoval*, ensuring compliance will depend on the willingness of the political branches to enforce the law's requirements by cutting off funds to offending institutions. The unquestionable value of litigation in deterring violations and providing a remedy to victims was never recognized by the Court.

### *B. Closing the Courthouse Doors in Favor of Arbitration*

There has been an important trend in recent years towards businesses insisting on arbitration clauses in contracts. This is common in many areas, such as employment and health care. Frequently, these clauses are written in broad terms and leave the other party to the contract no alternative but to forego access to the courts.

Last year, at the time I was teaching these cases in Civil Procedure, I purchased a new computer. The documentation accompanying the computer had a clause which said that I consented to arbitration for any claims that I had against the company. As a "class project," I wrote a letter to the computer company refusing consent to this pro-

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<sup>30</sup> *Sandoval*, 532 U.S. at 281-83.

<sup>31</sup> 122 S. Ct. 2268 (2002).

<sup>32</sup> 20 U.S.C. § 1232(g) (2003).

<sup>33</sup> *Gonzaga*, 122 S. Ct. at 2279.

<sup>34</sup> *Id.* at 2273-74.

vision. Moreover, I said that by reading my letter they consented that I could sue them in court. I still have not received a response.

It is doubtful that the Supreme Court would be receptive to such an effort. The Court has very aggressively enforced arbitration clauses even when it means that those with civil rights claims are denied access to the courts. *Circuit City Stores, Inc. v. Adams*,<sup>35</sup> involved an employee of a Circuit City store in California who sued the company in state court under state discrimination laws. His employment contract included a clause providing for arbitration of employment-related disputes. Circuit City filed a lawsuit in federal district court, pursuant to the Federal Arbitration Act, to compel arbitration.

The Federal Arbitration Act has an exception for maritime and other employment contracts in interstate commerce.<sup>36</sup> Nonetheless, the Supreme Court, in a 5-4 decision, ruled that the state law discrimination claims had to go to arbitration and could not be litigated in court.<sup>37</sup> The Court broadly construed the Federal Arbitration Act and narrowly interpreted its exception to apply only to employment of transportation workers. The Court did not discuss, or even acknowledge, the compelling public purpose in allowing victims of discrimination to have access to the courts.

It should be noted, though, that in *EEOC v. Waffle House, Inc.*,<sup>38</sup> the Court held that an arbitration clause does not preclude the Equal Employment Opportunity Commission from bringing a discrimination claim on behalf of an individual.<sup>39</sup> The Court explained that an individual, via an arbitration clause, waives his or her right to sue, but the person cannot waive the government's authority to bring an enforcement action. This is a significant ruling, but it does relatively little to undercut the effect of *Circuit City Stores, Inc. v. Adams*. The EEOC's ability to sue on behalf of individuals is inherently limited by scarce resources. The vast majority of employees with arbitration clauses in their contracts will not have any meaningful access to the courts when they are subjected to discrimination.

### *C. Closing the Courthouse Doors by Narrowing the Scope of Congress' Powers*

When constitutional historians look back at the Rehnquist Court, undoubtedly they will say that its greatest changes in constitutional law were in the area of federalism. In a series of important rulings, many involving civil rights laws, the Court has narrowed the scope of

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<sup>35</sup> 532 U.S. 105 (2001).

<sup>36</sup> 9 U.S.C. § 1 (2003).

<sup>37</sup> *Circuit City Stores, Inc.*, 532 U.S. at 109.

<sup>38</sup> 122 S. Ct. 754 (2002).

<sup>39</sup> *Id.* at 766.

Congress' constitutional powers. The effect of many of these decisions is to deny access to the courts to injured individuals.

For example, the Supreme Court dramatically restricted the scope of Congress' powers under Section Five of the Fourteenth Amendment. Section Five authorizes Congress to enact laws to enforce the Amendment. In *Katzenbach v. Morgan*,<sup>40</sup> the Court held that Congress may use this power to create new rights by statute, but it cannot restrict rights recognized by the courts. However, in *City of Boerne v. Flores*,<sup>41</sup> the Court implicitly overruled *Katzenbach v. Morgan* and held that under Section Five of the Fourteenth Amendment, Congress cannot create new rights or expand the scope of rights. Congress' power is limited to enacting laws to prevent and remedy violations of rights, and these statutes must be narrowly tailored so as to be "proportionate" and "congruent" to the problem.<sup>42</sup> In *City of Boerne v. Flores*, the Court declared unconstitutional the federal Religious Freedom Restoration Act, a key civil rights law, that passed almost unanimously through Congress, to expand the protections for free exercise of religion.<sup>43</sup>

The Court also has narrowed the scope of Congress' Section Five power by ruling that it may be used only to regulate state and local governments but not private conduct. In the *Civil Rights Cases*,<sup>44</sup> the Court decided that Congress, under Section Five, was limited to adopting laws regulating state and local government actions. But in several more recent cases, such as *United States v. Guest*,<sup>45</sup> a majority of the Justices said that Congress could use its Section Five powers to prevent private violations of civil rights.

In *United States v. Morrison*,<sup>46</sup> the Court overruled cases like *Guest* and held that Congress under Section Five cannot regulate private behavior. In *Morrison*, the Supreme Court, in a 5-4 decision, invalidated an important civil rights law: the provision of the Violence Against Women Act that authorized suits by victims of gender motivated violence. The Court held that Congress lacked the power under both Section Five and the Commerce Clause to enact such a law.<sup>47</sup> Many other civil rights statutes are likely to be vulnerable to constitutional challenge as a result of *Morrison's* narrow reading of Congress' powers.

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<sup>40</sup> 384 U.S. 641 (1966).

<sup>41</sup> 521 U.S. 507 (1997).

<sup>42</sup> *Id.* at 520.

<sup>43</sup> *Id.* at 536.

<sup>44</sup> 109 U.S. 3 (1883).

<sup>45</sup> 383 U.S. 745 (1966).

<sup>46</sup> 529 U.S. 598 (2000).

<sup>47</sup> *Id.* at 627.



The effect of this decision is to deny injured individuals access to the courthouse. The provision of the Violence Against Women Act declared unconstitutional in *Morrison* ensured that victims of gender-motivated violence, rape, and domestic abuse would be able to sue. The Court closed the courthouse door to these individuals. Another effect of the Supreme Court's narrowing the scope of Congress' powers under Section Five of the Fourteenth Amendment is in barring suits under federal civil rights laws against state governments. For example, in *Kimel v. Florida Board of Regents*,<sup>48</sup> the Court ruled that state governments cannot be sued for age discrimination in violation of the federal Age Discrimination in Employment Act. In *Board of Trustees of the University of Alabama v. Garrett*,<sup>49</sup> the Court held that state governments may not be sued for employment discrimination in violation of Title I of the Americans with Disabilities Act.

Both cases were decided by 5-4 margins and used the same reasoning. The Court held that Congress may authorize suits against states and override sovereign immunity only pursuant to Section Five of the Fourteenth Amendment. The Court said that under *City of Boerne v. Flores*, Congress cannot expand the scope of rights under Section Five and that each of these laws does just that by prohibiting more than the Constitution forbids. Both cases are very much about closing the courthouse doors to victims of discrimination. The Supreme Court did not declare unconstitutional the substantive provisions of the Age Discrimination in Employment Act or the Americans with Disabilities Act. Instead, what the Court did was to limit their enforcement by barring suits against state governments.

#### *D. Narrowly Interpreting Civil Rights Laws*

The Court also has precluded access to the courts by adopting very restrictive interpretations of federal civil rights laws. For example, in 1999 the Court held that under the Americans with Disabilities Act, a disability does not exist if the condition has been corrected. In *Sutton v. United Air Lines, Inc.*,<sup>50</sup> the Court ruled that individuals whose vision has been corrected so that it does not interfere with major life activities do not have a disability within the meaning of the Americans with Disabilities Act. Therefore, the failure to hire them based on their impaired vision does not violate the Act. Likewise, in *Murphy v. United Parcel Service, Inc.*,<sup>51</sup> the Court held that determination of whether an individual's physical or mental impairment substantially

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<sup>48</sup> 528 U.S. 62 (2000).

<sup>49</sup> 531 U.S. 356 (2001).

<sup>50</sup> 527 U.S. 471 (1999).

<sup>51</sup> 527 U.S. 516 (1999).

limits a major life activity so as to satisfy the Americans with Disabilities Act's definition of "disability" must take into consideration medication or other corrective devices that mitigate the individual's impairment.

These rulings make it permissible, for example, for an employer to refuse to hire a person with epilepsy or diabetes if these conditions are under control with medication; the Court says that the correction means that there is no disability for purposes of the Act. Of course, if the condition is not under control, then the employer can refuse to hire on that basis.

The Supreme Court's most recent decision concerning the Americans with Disabilities Act, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, continues the pattern of restrictive interpretations of the law.<sup>52</sup> The Court held that an impairment which prevents an individual from performing some job tasks is not a disability unless it "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."<sup>53</sup> Specifically, the Court ruled that a plaintiff's proof that she could not perform repetitive work with her hands and arms was not a disability because it was not demonstrated that it substantially limited her in a major life activity.<sup>54</sup>

*Williams* will unquestionably create an additional obstacle for many plaintiffs in disability cases. Individuals, like Williams, who have a medical condition that interferes with some job tasks, but not others, will find it difficult to prevail. More generally, *Williams* adopts a very restrictive definition of disability, requiring a substantial impairment of a major life activity. Work alone does not appear to be sufficient; Williams could not work at her assigned job, but the Court did not regard her as disabled.

But the problem with the Court's analysis is that disability always must be assessed relative to particular tasks. Obviously, a key purpose of the Americans with Disabilities Act was to end workplace discrimination against the disabled. The focus of Title I of the Act is prohibiting such discrimination and requiring that employers make reasonable accommodations for disabilities. From this perspective, work certainly should be regarded as a major life activity and an impairment that interferes with work should be regarded as a disability.

Moreover, the Court's approach makes the determination of what is a disability inherently subjective. Courts have great discretion in deciding what is a major life activity or what is a substantial enough interference to constitute a disability. Unfortunately, the Court, and

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<sup>52</sup> 534 U.S. 184 (2002).

<sup>53</sup> *Id.* at 198.

<sup>54</sup> *Id.* at 200-01.

many lower courts, use this discretion primarily against plaintiffs. The result is to close the courthouse doors to many civil rights plaintiffs.

*E. Eliminating Incentives to Litigation and Creating Disincentives*

The above techniques of closing the courthouse door have involved the Supreme Court precluding all access. The Court also rules against civil rights plaintiffs by eliminating incentives to litigation and creating obstacles which are a disincentive to suits.

An example of the former is the Supreme Court's important ruling in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, where the Court made it much more difficult for successful plaintiffs to recover attorneys' fees.<sup>55</sup> The availability of attorneys' fees under civil rights statutes is a major incentive for suits. The reality is that without this incentive, it would be far more difficult to enforce civil rights laws.

*Buckhannon* involved a challenge to state regulations under several federal statutes, including the Rehabilitation Act and the Americans with Disabilities Act. There was protracted litigation and ultimately the state voluntarily changed its policy and adopted what the plaintiffs had been seeking through their suit. The plaintiffs then sought attorneys' fees on the grounds that they had been the catalyst for the suit. The Supreme Court, in a 5-4 decision, rejected this and held that a plaintiff is not deemed to "prevail" just because his or her lawsuit is the "catalyst" for the government to change its policy.<sup>56</sup> Attorneys' fees are to be awarded only when there is a judicial action—a judgment or consent decree—in favor of the plaintiff.

The result is that a defendant can preclude a deserving plaintiff from recovering attorneys fees simply by changing policies before a verdict. Reducing the chances of attorneys' fees in this way will remove a crucial incentive to litigation in many cases and effectively close the courthouse door in many civil rights cases.

An example of the Court creating a disincentive to litigation is the Supreme Court's decision in *Raygor v. Regents of the University of Minnesota*.<sup>57</sup> The Court imposed a significant restriction on supplemental jurisdiction in suits against state governments and thus created an obstacle to litigation of civil rights claims. The law of federal court jurisdiction long has allowed a federal court to hear state law claims that arise from the same facts as federal law claims properly before the federal court. For example, in *United Mine Workers of America v.*

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<sup>55</sup> 532 U.S. 598 (2001).

<sup>56</sup> *Id.* at 610.

<sup>57</sup> 534 U.S. 533 (2002).

*Gibbs*,<sup>58</sup> the Court ruled that federal courts hearing federal question claims may decide state law claims, even though not otherwise in their jurisdiction, if they “derive from a common nucleus of operative fact.”<sup>59</sup> Pendent jurisdiction was a well established judicially created doctrine.

In 1990, Congress revised the jurisdictional statutes expressly to authorize federal courts hearing such suits. Specifically, 28 U.S.C. § 1367 creates supplemental jurisdiction and essentially codifies the prior law into statute.<sup>60</sup> Section 1367(d) addresses a common sense, practical problem: if the federal court ends up dismissing a case because the federal questions are not viable, in many cases the statute of limitations will have run in the meantime on the state claims, thus precluding them from being filed in state court. Section 1367(d) thus provides that the statute of limitations on the state claims “shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.”<sup>61</sup>

The issue in *Raygor v. Regents of the University of Minnesota* was whether this provision is constitutional when the claims are against a state government. Lance Raygor and James Goodchild sued the University of Minnesota in federal court for age discrimination. They alleged a violation of the federal Age Discrimination in Employment Act of 1967,<sup>62</sup> and of state anti-discrimination laws. In January 2000, while their case was pending, the Supreme Court decided *Kimel v. Florida Board of Regents*,<sup>63</sup> and held that state governments cannot be sued for violations of the Age Discrimination in Employment Act without their consent.<sup>64</sup>

The federal district court then exercised its discretion under Section 1367 to dismiss Raygor’s and Goodchild’s suit because all that remained was state law claims. Raygor and Goodchild filed suit in state court under state law, but the state moved to dismiss contending that the statute of limitations had expired in the meantime. Raygor and Goodchild pointed to Section 1367(d), which tolled the statute of limitations while the claims were pending in federal court. The Minnesota Supreme Court, though, declared this provision unconstitutional, concluding that Congress constitutionally could not toll the statute of limitations on state claims in state court.

The Supreme Court, in a 6-3 decision, affirmed. Justice Sandra Day O’Connor wrote for the Court and emphasized that “with respect

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<sup>58</sup> 383 U.S. 715 (1966).

<sup>59</sup> *Id.* at 725.

<sup>60</sup> 28 U.S.C. § 1367 (2000).

<sup>61</sup> 28 U.S.C. § 1367(d) (2000).

<sup>62</sup> 29 U.S.C. §§ 621-634 (2000).

<sup>63</sup> 528 U.S. 62 (2000).

<sup>64</sup> *Id.* at 92.

to suits against a state sovereign in its own courts . . . a State 'may prescribe the terms and conditions on which it consents to be sued.'<sup>65</sup> Justice O'Connor said that Section 1367(d) does not clearly state that it was meant to apply to claims against state governments. She therefore concluded that to avoid serious constitutional questions the Court would interpret Section 1367(d) to not apply to state claims filed against a state government in state court.

From a practical perspective, this case is very troubling in terms of the choices it will pose for litigants. A lawyer having both federal and state law claims will have several options, none desirable. One approach would be to file both the federal and state claims in state court and forego federal court entirely. This, of course, undermines the availability of federal courts and is especially undesirable in areas where the federal court is perceived as more hospitable to civil rights claims than the state court. Another possibility would be to file suit in both federal court and state court, or at least to file in state court right before the statute of limitations on the state courts is about to run. This is certainly permissible, but the problem is that whichever court decides first, federal or state, will completely preclude the other from deciding the matter. Res judicata—claim preclusion—will apply once one court renders a decision.

Thus, the effect of *Raygor* is to undermine the availability of federal courts to hear federal claims. This is particularly troubling because it is based on a principle—that sovereign immunity protects states from being sued in state court—that has no foundation in the Constitution's text, history, or even precedents before a few years ago.

#### *F. Broadly Interpreting Statutes which Close the Courthouse Doors*

The Court also has closed the courthouse doors by very expansively interpreting statutes that preclude access to the judiciary. The Prison Litigation Reform Act of 1995,<sup>66</sup> requires that prisoner's exhaust administrative remedies before bringing suits in court concerning prison conditions. Specifically, it states: "No action shall be brought with respect to prison conditions . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."<sup>67</sup>

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<sup>65</sup> *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 543 (2002) (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858)).

<sup>66</sup> 42 U.S.C. § 1997e(a) (2003).

<sup>67</sup> *Id.*

*Porter v. Nussle*<sup>68</sup> posed the question of whether this exhaustion requirement applies to a prisoner's claim for excessive force by prison authorities. Ronald Nussle, an inmate in a Connecticut prison, filed suit in federal court charging that corrections officers subjected him to a severe beating in violation of the Eighth Amendment's ban on cruel and unusual punishment. The United States Court of Appeals for the Second Circuit ruled that the Prison Litigation Reform Act's exhaustion requirement did not apply because it concerns complaints about general conditions in the prison, not single incidents of excessive force.

The Supreme Court unanimously reversed the Second Circuit and held that a prisoner must exhaust the prison grievance procedure for all claims, whether they involve a particular instance or general conditions.<sup>69</sup> The Court, in an opinion by Justice Ginsburg, expansively interpreted "conditions" and the exhaustion requirement in the law. The result is that prisoners will be delayed in getting to court and the procedural hurdles may keep some from getting there at all.

This is the second time in the last year that the Court has broadly interpreted the exhaustion requirement in the PLRA. In *Booth v. Churner*,<sup>70</sup> the Court held that a prisoner seeking monetary relief must exhaust administrative procedures, even if they cannot provide any money damages, so long as they can provide something to benefit the prisoner. Together, *Porter v. Nussle* and *Booth v. Churner* interpret the exhaustion requirement extremely expansively and effectively close the courthouse door to many prisoners.

## II. THE IRONY: THE COURT EXALTS ITS OWN ROLE WHILE SHOWING LITTLE RESPECT FOR THE IMPORTANCE OF THE JUDICIAL PROCESS

Perhaps the techniques and cases described above can be understood as a reflection of a Supreme Court with a very limited view of the proper role of the judiciary in a democratic society. The problem with this interpretation is that it does not fit with how the Court has defined its own role. This is a Supreme Court that defers to no one: not Congress, not administrative agencies, not state legislatures, and not state courts. The paradox is that in the last decade, the Supreme Court has very much exalted its own role, while showing little respect for the importance of access to other courts.

For example, the Rehnquist Court has declared federal laws unconstitutional at a much faster rate than either the Warren or Burger

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<sup>68</sup> 534 U.S. 516 (2002).

<sup>69</sup> *Id.* at 532.

<sup>70</sup> 532 U.S. 731 (2001).

Courts.<sup>71</sup> In the last decade, the Court has struck down major federal laws limiting the scope of Congress' commerce power,<sup>72</sup> restricting Congress' authority under Section Five of the Fourteenth Amendment,<sup>73</sup> using the Tenth Amendment as a constraint on Congress,<sup>74</sup> and denying Congress the ability to authorize suits against state governments.<sup>75</sup>

Most revealing have been the Court's decisions limiting the scope of Congress' powers under Section Five of the Fourteenth Amendment. In a series of decisions beginning with *City of Boerne v. Flores*,<sup>76</sup> the Court has held that Congress under Section Five of the Fourteenth Amendment cannot expand the scope of rights. Rather, Congress can only enact laws to prevent or remedy violations of rights recognized by the courts and these laws must be "proportionate" and "congruent" to the violations.

In *City of Boerne v. Flores*, for example, the Court struck down a federal statute, the Religious Freedom Restoration Act, that expanded the safeguards accorded to the free exercise of religion.<sup>77</sup> The Act was adopted in 1993 to overturn a recent Supreme Court decision that had narrowly interpreted the Free Exercise Clause of the First Amendment, *Employment Division, Department of Human Resources of Oregon v. Smith*.<sup>78</sup> Oregon law prohibited the consumption of peyote, a hallucinogenic substance. Native Americans challenged this law claiming that it infringed free exercise of religion because their religious rituals required the use of peyote. Under prior Supreme

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<sup>71</sup> See Seth P. Waxman, *Defending Congress*, 79 N.C.L. REV. 1073, 1074-75 (2001) ("Since 1995, the Court has invalidated twenty-six different federal enactments, and its pending merits docket includes several other constitutional challenges to federal statutes.").

<sup>72</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating the civil damages provision in the Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun Free School Zone Act as exceeding the scope of Congress' commerce power).

<sup>73</sup> See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act as exceeding the scope of Congress' Section Five powers).

<sup>74</sup> See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (invalidating the Brady Handgun Control Act as violating the Tenth Amendment); *New York v. United States*, 505 U.S. 144 (1992) (invalidating provisions of the Low-Level Radioactive Waste Act as violating the Tenth Amendment).

<sup>75</sup> See, e.g., *Kimel v. Fl. Bd. of Regents*, 528 U.S. 62 (2000) (holding the ADEA's abrogation of the states' sovereign immunity exceeded Congress' authority under Section Five of the Fourteenth Amendment); *Fl. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (holding Congress' attempt to abrogate the states' sovereign immunity with the Patent and Plant Variety Protection Remedy Clarification Act is unconstitutional); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding Congress lacks power to abrogate states' sovereign immunity under the Indian Commerce Clause).

<sup>76</sup> 521 U.S. 507 (1997).

<sup>77</sup> Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2000bb4 (2003) (hereinafter "RFRA").

<sup>78</sup> 494 U.S. 872 (1990).

Court precedents, government actions burdening religion would be upheld only if they were necessary to achieve a compelling government purpose.<sup>79</sup> The Supreme Court, in *Smith*, changed the law and held that the Free Exercise Clause cannot be used to challenge neutral laws of general applicability. The Oregon law prohibiting consumption of peyote was deemed neutral because it was not motivated by a desire to interfere with religion and it was a law of general applicability because it applied to everyone.

In response to this decision, in 1993, Congress overwhelmingly adopted the Religious Freedom Restoration Act, which was signed into law by President Clinton. The Religious Freedom Restoration Act was express in stating that its goal was to overturn *Smith* and restore the test that was followed before that decision. The Act requires courts considering free exercise challenges, including to neutral laws of general applicability, to uphold the government's actions only if they are necessary to achieve a compelling purpose. Specifically, RFRA prohibited "[g]overnment" from "substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."<sup>80</sup>

The Court declared RFRA unconstitutional and held that Congress is limited to enacting laws that prevent or remedy violations of rights already recognized by the Supreme Court. Moreover, the Court said that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."<sup>81</sup>

Justice Kennedy defended this conclusion by invoking the need to preserve the Court as the authoritative interpreter of the Constitution. Justice Kennedy quoted *Marbury v. Madison* and wrote:

If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts . . . alterable when the legislature shall please to alter it."<sup>82</sup>

Justice Kennedy concluded this part of the majority opinion by declaring: "Shifting legislative majorities could change the Constitution

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<sup>79</sup> See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding state act which abridged appellant's right to free exercise of her religion was unconstitutional under the First Amendment).

<sup>80</sup> RFRA, *supra* note 77, §§ 2000bb-3.

<sup>81</sup> *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

<sup>82</sup> *Id.* at 529 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).



and effectively circumvent the difficult and detailed amendment process contained in Article V."<sup>83</sup>

This tremendously exalts the Court's role relative to Congress. Rather than hold that both Congress and the Court can expand the scope of constitutional rights, *Boerne* clearly holds that it is only for the Supreme Court to do so.

Nor is this a Court that defers to state legislatures or state courts. Although the Rehnquist Court purports to be concerned with federalism, it frequently finds that state laws are preempted by federal law.<sup>84</sup> The Rehnquist Court's use of federalism has been entirely about limiting Congress' powers, not about empowering state and local governments generally.

The Court's unwillingness to defer to state courts is, of course, best illustrated by its decision in *Bush v. Gore*.<sup>85</sup> The Supreme Court's per curiam opinion made two arguments. First, counting the uncounted votes without standards violates equal protection.<sup>86</sup> Second, *Florida law* prevents the counting from continuing past December 12.<sup>87</sup> This second point is indispensable to the Court's decision to end the counting. Assuming that there were inequalities in the counting that violated the Constitution, there were two ways to remedy this: count none of the uncounted ballots or count all of the ballots with uniform standards. The latter would involve remanding the case to the Florida Supreme Court for development of standards and for such relief as that court deemed appropriate.

It must be emphasized that the Supreme Court did not hold that federal law prevented the counting from continuing. The only reason for not remanding the case—as Justices Souter and Breyer argued for<sup>88</sup>—was the Court's judgment that Florida law prevented this. In two paragraphs near the end of the per curiam opinion, the Court explains why it is stopping the counting:

The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal electoral process," as provided in 3 U.S.C. § 5 . . . . That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be un-

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<sup>83</sup> *Id.*

<sup>84</sup> See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

<sup>85</sup> 531 U.S. 98 (2000).

<sup>86</sup> *Id.* at 104-05.

<sup>87</sup> *Id.* at 110.

<sup>88</sup> *Id.* at 129.

constitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.

Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy . . . . The only disagreement is as to the remedy . . . . Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, Justice Breyer's proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest under December 18—contemplates action in violation of the Florida Election Code, and hence could not be part of an “appropriate” order authorized by FLA. STAT. ANN. § 102.168(8) (Supp. 2001).<sup>89</sup>

This is recited at length to show that the sole reason the Court gave for ending the counting was based on its interpretation of Florida law. However, no Florida statute stated or implied that the counting had to be done by December 12. The sole authority for the Supreme Court's conclusion was one statement by the Florida Supreme Court.

However, that statement was made in a very different context and when the Florida Supreme Court was not faced with the issue posed by the Supreme Court's ruling. After the Supreme Court decided on December 12 that the counting without standards violated equal protection, the issue was what remedy was appropriate under Florida law: continue the counting past December 12 or end the counting to meet the December 12 deadline. The Supreme Court could not possibly know how the Florida Supreme Court would resolve this issue because it never had occurred before. Prior Florida decisions emphasized the importance of making sure that every vote is accurately counted.<sup>90</sup> The Florida Supreme Court might have relied on this to continue the counting past December 12. Alternatively, the Florida Supreme Court might have ended the counting, treating December 12 as a firm deadline in Florida.

Indeed, after *Bush v. Gore* was decided, the Florida Supreme Court issued a decision dismissing the case.<sup>91</sup> Justice Shaw, in a concurring opinion, declared:

[I]n my opinion, December 12 was not a “drop-dead” date under Florida law. In fact, I question whether any date prior to January 6 is a drop-dead date under the Florida election scheme. December 12 was simply a *permissive* “safe-harbor” date to which the states could aspire. It certainly was not a *mandatory* contest deadline under the plain language of the Florida Election Code . . . .<sup>92</sup>

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<sup>89</sup> *Id.* at 110-11.

<sup>90</sup> *See, e.g.*, *Palm Beach Cty. Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000).

<sup>91</sup> *Gore v. Harris*, 773 So. 2d 524 (Fla. 2000).

<sup>92</sup> *Id.* at 528-29 (emphasis in original).

Perhaps a majority of the Florida Supreme Court would have followed this view, perhaps not. The point is that this was a question of Florida law to be decided by the Florida Supreme Court. It, of course, is clearly established that state supreme courts get the final word as to the interpretation of state law. In *Murdock v. City of Memphis*, in 1875, the Supreme Court held that it could review only questions of federal law and that the decisions of the state's highest court are final on questions of state law.<sup>93</sup> The Court explained that Section 25 of the Judiciary Act was based on a belief that the Supreme Court must be available to ensure state compliance with the United States Constitution, but that there was no indication that Congress intended the Court to oversee state court decisions as to state law matters.<sup>94</sup>

From a federalism perspective, it is inexplicable why the five Justices in the majority—usually the advocates of states' rights on the Court—did not remand the case to the Florida Supreme Court to decide under Florida law whether the counting should continue. The Supreme Court impermissibly usurped the Florida Supreme Court's authority to decide Florida law in this extraordinary case. The point is that this is a Court that exalts its own role, while closing access to other courts.

### III. WHAT CAN BE DONE ABOUT THIS?

There are no obvious or easy solutions precisely because the Supreme Court gets the last word and because it has been so consistently hostile to civil rights plaintiffs. But there are avenues for re-opening the courthouse doors to civil rights litigants.

First, federal legislation can remedy many of the recent Supreme Court decisions. Obviously, constitutional decisions cannot be overruled by statute. But many of the recent rulings have been construing federal statutes, not the Constitution. For example, Congress, by statute, could amend Title VI to overcome *Alexander v. Sandoval* and allow suits to enforce the regulations which prohibit recipients of federal funds from engaging in practices with a racially discriminatory impact. The Federal Arbitration Act could be amended to overrule *Circuit City Stores, Inc. v. Adams* and provide that employment discrimination cases can be litigated, rather than arbitrated, even where there are contractual provisions calling for arbitration. Congress could revise the attorneys' fees laws to nullify *Buckhannon* and specify that plaintiffs who are the catalyst for action are the prevailing party. Congress even could try to overcome some of the recent sovereign

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<sup>93</sup> 87 U.S. (20 Wall.) 590 (1875).

<sup>94</sup> *Id.* at 611.

immunity decisions by documenting a pattern of state discrimination against the elderly and the disabled.

Yet, such legislation has not been passed. Why not? At other times, Congress has acted to overturn Supreme Court decisions which narrowly interpreted federal civil rights statutes.<sup>95</sup> In part, the answer may be political. Republicans have controlled the House of Representatives since 1994 and were the majority in the Senate until 2001. Advancing civil rights obviously is not a part of the Republican agenda.

But there is another, more subtle explanation for the congressional inactivity. The Supreme Court's decisions described in this paper have been primarily procedural in nature. It is much more difficult to interest the public, and therefore Congress, in laws about aspects of jurisdiction and court procedure. *Buckhannon* may be vitally important to civil rights litigants, but it is not a ruling that will get headlines. Supplemental jurisdiction does not engage the media's attention. A significant obstacle to legislative solutions is the complicated and procedural nature of the rulings.

Second, state legislatures can act in many of these areas. Some states have enacted laws waiving their sovereign immunity with respect to discrimination suits.<sup>96</sup> Some have adopted or are considering their own versions of the Violence Against Women Act.<sup>97</sup>

The primary problem with this is that it will require actions of fifty state legislatures, which is much more difficult than persuading one federal legislature, Congress, to act. The reality, of course, is that even a concerted effort at state legislation will leave many citizens, in many states that don't act, without protections. Also, in some areas, state governments cannot provide an effective remedy. For instance, the Supreme Court's decision in *Circuit City Stores, Inc. v. Adams*, requiring arbitration of discrimination claims, was based on an interpretation of the Federal Arbitration Act and thus cannot be overcome by state legislation.<sup>98</sup>

Third, and perhaps most importantly, there must be a major effort to block conservative judicial nominees for the federal courts. The decisions described throughout this paper are a product of conservative judicial ideology. The composition of the courts is thus determinative of whether this trend will continue and even become

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<sup>95</sup> See 42 U.S.C. § 1981 (1994) (extending the broad right to make and enforce contracts, sue, and receive the full benefit of all laws and proceedings to all citizens).

<sup>96</sup> See DEL. CODE ANN. tit. 10, § 4001 (2003); FLA. STAT. chs. 760.01, 768.28 (2002); KY. REV. STAT. ANN. §§ 344.020, 344.450 (Banks-Baldwin 2002); N.H. REV. STAT. ANN. § 135-C:57 (2002); N.Y. EXEC. LAW § 297 (McKinney 2003).

<sup>97</sup> See, e.g., CAL. CIV. CODE § 52.4 (West 2003).

<sup>98</sup> 532 U.S. 105 (2001).

much worse. It is essential that the Senate force President Bush to pick moderates, rather than conservatives for the federal bench.

### CONCLUSION

This is a difficult time for civil rights plaintiffs. *Velazquez* was an important victory, but it was atypical. In *Velazquez*, the Court recognized the importance of access to the courts and struck down a provision of federal law that prohibited attorneys receiving federal Legal Services funds from challenging welfare laws. But in countless other decisions, the Court has done just the opposite, failing to recognize the need for access to the courts.

In his wonderful commentary to this paper at the conference at the University of Pennsylvania Law School, David Rudovsky rightly pointed out that civil rights suits are still being filed and that they often still succeed.<sup>99</sup> Although this is true, the reality is that it has become increasingly difficult and the future threatens to make this worse. Concerted efforts are essential now, such as in legislation by Congress and state governments and in blocking conservative judicial nominees. The future of civil rights litigation depends on it.

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<sup>99</sup> David R. Rudovsky, *Civil Rights Litigation: The Current Paradox*, 5 U. PA. J. CONST. L. 487 (2003).